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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

SOUTHWESTERN BROADCASTING)
CORPORATION)

MM Docket No. 96-104

For Renewal of License for
Station KLZK(FM)
Brownfield, Texas

To: The Commission

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**CONSOLIDATED BRIEF AND EXCEPTIONS TO
SUMMARY DECISION OF ALJ RICHARD L. SIPPEL**

**SOUTHWESTERN BROADCASTING
CORPORATION**

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SUMMARY

In this case, the license renewal application for WLZK(FM), Brownfield, Texas was designated for hearing to determine whether the station's silence from 1990 to the present demonstrates that the licensee, Southwestern Broadcasting Corporation ("Southwestern"), lacks the capability and intent to resume operation of the station. The renewal application was filed in 1990 and requested renewal of authority to operate as a low-power, Class A station on Channel 280A.

However, before the remand application was filed, the Commission authorized KLZK to operate as a Class C2 station on Channel 282C2, contingent on the filing of an application for new facilities on the higher class frequency. While the requisite application was filed in 1989, it was dismissed in 1992, and another application for new facilities on Channel 282C2 was not filed until May 8, 1996, shortly after this case was designated for hearing.

Also, in 1989 the Mass Media Bureau ("Bureau") authorized KKYN, Plainview, Texas to upgrade its frequency from Channel 280A to 280C1. This action prevented KLZK from returning to operate on Channel 280A because such operation would not have been far enough away from KKYN to meet the mileage separation requirements of the Commission's rules.

As a result, KLZK cannot resume broadcasting with the Channel 280A facilities specified in its existing license, and therefor needs authorization from the Commission to begin operations with new facilities. However, and prehearing conferences in this case, after first representing that KLZK's May 8, 1996 application would receive expedited processing, the Bureau then reversed itself and refused to process that application at all. If the Bureau

does not grant the application in the near future, Southwestern will be unable to return KLZK to the air by February 9, 1997, and its license will automatically expire pursuant to recently enacted 47 U.S.C. 312(g).

In recognition of these unique circumstances, where delayed consideration of the KZMK renewal application would result in the automatic forfeiture of the licensee and operating rights irrespective of the merits of its case, the ALJ adopted summary procedures to decide this case. He issued his Summary Decision ("S.D.") on July 29, 1996, recommending a denial of the KZLK renewal application.

The following brief takes exception to:

(a) The refusal of the Bureau to process the May 8, 1996 application for new facilities which would permit KLZK to operate on Channel 282C2. In the past, similarly situated licensees have been able to demonstrate their capability and intent to resume operations by actually putting their stations back into service following designation for hearing. Here, the Bureau's refusal to process the recently filed application denies KLZK the opportunity given other applicants to demonstrate their fitness for licensee renewal. Since the KZLK license was not afforded adequate notice that the Bureau would refuse to process its application, the Bureau's action violates elementary principals of due process and must be reversed. If the Commission chooses to reverse the Bureau's action, it may avoid further consideration of the merits of the case by issuing an order requiring the Bureau to process the application expeditiously and holding these proceedings in abeyance until KZLK is returned to the air or its authorization is automatically terminated under the recent amendments to the statute.

(b) The conclusions in the S.D. that the renewal applicant's failure to resume operations at KLZK demonstrate that it lacks the capability and intent to return the station to the air. To the contrary, the record demonstrates that Commission actions permitting other stations to operate with facilities which would have interfered with KLZK's resumption of service were the primary cause of the station being silent since 1990.

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**CONSOLIDATED BRIEF AND EXCEPTIONS TO
SUMMARY DECISION OF ALJ RICHARD L. SIPPEL**

Southwestern Broadcasting Corporation ("Southwestern") licensee of KLZK(FM), Brownfield, Texas, pursuant to 47 C.F.R. §1.276 hereby submits its exceptions and brief in support thereof to the Summary Decision of Administrative Law Judge Richard L. Sippel, ("S.D.") FCC 96-04, released July 29, 1996, in which Judge Sippel ("ALJ") denied Southwestern's Motion for Summary Decision ("Motion"), granted the Mass Media Bureau's Countermotion for Summary Decision ("Countermotion"), resolved the designated issues against Southwestern and denied the captioned application for renewal of Southwestern's license for KLZK.

I. Statement of the Case

A. The Hearing Designation Order.

By Hearing Designation Order ("HDO"), DA 96-657, released April 29, 1996, the Assistant Chief of the Mass Media Bureau's Audio Services Division ("Bureau") designated

the captioned renewal application for hearing to determine whether, in view of KLZK's silence since Southwestern acquired it in July of 1990, the public interest would be served by a renewal of license.

The following issues were specified in paragraph 6 of the HDO:

- (1) To determine whether Southwestern Broadcasting corporation has the capability and intent to expeditiously resume the broadcast operations of KLZK(FM), consistent with the Commission's Rules.
- (2) To determine whether Southwestern Broadcasting Corporation has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (3) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal interest, convenience and necessity.

Following designation of these issues, the Bureau ordered in paragraph 7 of the HDO that

. . . in the event it is determined that grant of the renewal of license application would serve the public interest, convenience and necessity, the grant will be conditioned on the expeditious resumption of operations, the precise period of time to be established in the hearing. Failure to resume operations within the time specified in the condition will result in the cancellation of the license and the deletion of the station's call letters.

B. Prehearing Proceedings

Southwestern entered its Notice of Appearance on May 14, 1996, stating, inter alia, "its desire to initiate negotiations leading to a consent order pursuant to 47 C.F.R. §§ 1.93-94, and . . . that its counsel is available to begin such negotiations with representatives of the Mass Media Bureau at the earliest convenient date."

At the first Prehearing Conference, held June 6, 1996, the ALJ noted Southwestern's desire to negotiate a consent order, and asked Bureau counsel "if there were any questions

about Southwestern's basic qualifications." Tr. 3. Bureau counsel replied: "No there aren't." Id. Then, Bureau counsel stated at Tr. 6:

We believe that in similar instances where silent stations have in fact returned to the air prior to or during the hearing process or prior to the hearing date and submitted evidence of that, we've supported termination of the proceeding.

Further discussion of a proposed consent order ensued. The ALJ proposed an order under which Southwestern would be required to complete various steps of the construction process by dates certain, and if not the Bureau could move for an immediate ruling denying renewal. Tr. 10. Counsel for the Bureau responded: "We don't have any problem with that . . . Once again, it will all rest on whether we can agree to what's proposed in the consent order." Id.

The ALJ then ordered the parties to provide him with a status report on their negotiation of a consent order by June 28, 1996, and that either a proposed consent order or a motion for summary decision be filed by July 15, 1996. Tr. 12.

Following this discussion, Bureau counsel brought up the subject of the Public Notice, DA 96-818, released May 22, 1996 (Procedures Announced for Expedited Processing of Applications filed by Silent Broadcast Stations, hereinafter "Expedited Processing"). Tr. 13. In Expedited Processing, the Commission stated that under Section 403(1) of the Telecommunications Act of 1996 [47 U.S.C. § 312(g)] the license for any station which has been silent for 12 consecutive months on February 9, 1997 would automatically expire on that date, and noted that some stations needed "the Commission's grant of an application in order to resume operations." Id. Therefore, "recognizing that the new legislation creates a

need for expedient action on applications that are required to return a silent station to the air," the Commission established specific procedures for processing such applications. Id.

In describing the applicability of Expedited Processing to Southwestern at the June 6, 1996 prehearing conference, Bureau counsel stated that "Southwestern falls into that category". Tr. 13.^{1/} He also urged Southwestern's counsel to make sure that his client observed the procedures set forth in the Public Notice. Counsel for Southwestern then responded that his client had sent an application for a permit to construct new facilities to the Commission's Pittsburgh office on May 7, 1996.^{2/} Tr. 14. After some further discussion, Bureau counsel said "the Bureau is taking special steps to assist broadcasters who found themselves in this situation without regard to the reasons why", and added "We stand ready" to assist Southwestern in obtaining expedited processing. Tr. 19, emphasis added. As described in greater detail below, the positions taken by Bureau counsel at the first prehearing conference were consistent with silent station case policies followed by the Bureau in the past. See Video Marketing Network Inc., 10 FCC Rcd 7611, 7613 (M.M.B. 1995) (resumption of broadcasting by silent station provides basis for concluding hearing by summary decision favorable to licensee); Keyboard Broadcasting Communication, 10 FCC

^{1/} As will be demonstrated in part A of the argument section of this brief, the license which is the subject of renewal herein specifies operation on Channel 280A. KLZK cannot be operated on that channel without violating the Commission's technical rules. Therefore before KLZK can be returned to the air, the Commission must grant an application for new facilities.

^{2/} Southwestern's application, File No BPH-96-0508IA, hereinafter referred to as the "KLZK Upgrade Application", was dismissed by the Bureau's Audio Services Division on August 5, 1996. Southwestern will file a separate application for review of this action in the near future.

Rcd 4489 (M.M.B. 1995) (Bureau reverses ALJ conclusion that licensee was incapable of expeditiously resuming operation and terminates revocation proceeding because licensee had returned station to operation after release of designation order); Cavan Communications Inc., 10 FCC Rcd. 2873 (ALJ 1995).

However, the Bureau's willingness to follow its own precedent and that established by the Commission, presumably at the Bureau's request, in Expedited Processing soon disappeared. At a second prehearing conference on June 26, 1996, Bureau counsel announced that expedited processing of Southwestern's application "will not take place," because the "Bureau has interpreted the Commission's public notice [Expedited Processing] as not pertaining to post designation modification applications." Tr. 25, 27. On the basis of this interpretation, Bureau counsel stated that "the underlying predicate for negotiation and settlement is . . . no longer relevant, unless . . . Southwestern is able to expeditiously resume broadcasting without reference to the particular modification application [in] question. Tr. 28 After pointed questions from the ALJ, counsel for the Bureau stated:

To the extent that my surmise at the first pre-hearing was in keeping with what I ascertained as existing policy at the time, I thereafter learned very soon that that was not the position of the Bureau.

(Tr. 29-30, emphasis added.) Counsel for the Bureau stated that it was retreating from its earlier agreement to negotiate a consent order, Tr. 36, because it felt bound by a policy of the Commission. Tr. 41

After voicing his frustration with the Bureau's change in position, the ALJ ordered the Bureau to file a memorandum explaining "exactly what happened. . . that prompted [the Bureau] to change from June 6th to today in a way that has really put [Southwestern] . . . at

a significant procedural disadvantage." Tr. 48. The ALJ urged the Bureau to reconsider its position to determine whether there was some way that Southwestern's application could be processed

which would result in a consent order and getting this case resolved as the Commission wants . . . its broadcast cases to be settled, and in general . . . wants licenses to be granted, and broadcasting to be put on the air as expeditiously as possible. Tr. 5

The ALJ ordered the Bureau to file by July 5, 1996, a memorandum setting forth the Bureau's thinking on its change in positions, including "the authority . . . the regulations, the public announcements, the rulemaking, or whatever it is that you are relying upon, to come . . . to this very hard conclusion. Tr. 52.

The Bureau filed its Memorandum of Law and Policy on July 3, 1996. Essentially the Bureau claimed that it had made its own policy determination not to process applications such as Southwestern's. No Commission authority was cited as a basis for this determination, other than the unsupported claim that Expedited Processing was a narrow exception to the Bureau's policy, not applicable to Southwestern. Id., p. 2. The Bureau did not attempt to explain why or how its own counsel had "ascertained . . . existing policy" to be precisely the opposite as of the first prehearing conference on June , 1996. Tr. 29.

Following the ALJ's directions, Southwestern filed its Motion for Summary Decision on July 5, 1996, and the Bureau filed its countermotion on July 19, 1996. On July 24, 1996, Southwestern filed a Conditional Waiver of Opposition Rights, based on the ALJ's promise that he would issue a decision in this case by July 26, 1996, the last day before he left for a three week vacation to attend his daughter's wedding in a foreign country. Id. and Tr. 43-44.

C. The ALJ's Summary Decision

In an effort to accelerate Commission review of the unique factual and legal issues of this case, the ALJ, at the request of Southwestern and with the cooperation of the Bureau, greatly condensed the time which normally would have been available for preparing his decision. Southwestern respectfully submits that as a result, his S.D. contains numerous factual and legal errors which render it unreliable as a basis for deciding this case. If the Commission desires to render a full decision on the merits of the issues designated in the HDO, Southwestern submits that the facts set forth at pages 3-19 of its Motion for Summary Judgment, which were not challenged by the Bureau,^{3/} provide a far more correct and complete basis for rendering a decision than does the S.D. However, page limitations prohibit Southwestern from repeating those facts herein. Rather, Southwestern will address herein only the ALJ's conclusions of law, but will point out where those conclusions are unsupported by the facts as well as where they are contrary to Commission policy and precedent. It should also be noted that review of the ALJ's S.D. would not be necessary if the Commission concludes as suggested in part A of the following Argument, that the Bureau's refusal to process the KLZK Upgrade Application was reversible error. Such a conclusion would permit the Commission to suspend further action in this case while the KLZK Upgrade Application is processed and granted. If, after grant of said application, Southwestern constructs its new facilities and resumes operations by February 9, 1997, this case can be terminated without reaching the merits under well-established precedent. If Southwestern fails to resume operation by said date, its license would automatically terminate

^{3/} See the Bureau's Counter-motion at p. 7 ("the facts of this case are not in dispute").

pursuant to 47 U.S.C. § 312(g) and this case could be dismissed as moot without consideration of its merits.

In the event the Commission rejects Southwestern's position on the Bureau's refusal to prosecute the KLZK upgrade Application, Southwestern will demonstrate in parts B and C of its Argument that the ALJ erred when he concluded at ¶¶ 16 and 17 of the S.D. that

(a) Southwestern refused to take any steps to return KLZK to the air as a Class A station and made a determination that it would only operate as a Class C2 station;

(b) Southwestern chose to remain silent for over six years by failing to file upgrade applications which would have been mutually exclusive with existing special temporary operating authorizations ("STA's") by other stations;

(c) "as a direct result" of Southwestern's failure to request Commission authorizations that would have permitted it to return to the air, KLZK has been silent since 1990;^{4/}

II. ARGUMENT

A. Due Process Requires that the Commission Grant the KLZK Upgrade Application and Hold this Case in Abeyance Until Southwestern Begins Service with New Facilities or its License is Terminated Pursuant to 47 U.S.C. §312(g)

In his landmark opinion in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850 (D.C. Cir. 1971), cert. denied 403 U.S. 923 (1971), Circuit Judge Leventhal noted that

^{4/} Paragraph 16 of the S.D. recites that Southwestern acquired KLZK on May 4, 1990. In fact, Southwestern did not acquire the station until July 1, 1990. HDO, ¶3.

judicial review of agency action ". . . begins at the threshold, with enforcement of the requirement of reasonable procedures, with fair notice and opportunity to the parties to present their case." (emphasis added) Several years later in Bamford v. FCC, 535 F.2d 78, 82 (D.C. Cir. 1976), cert. denied, 429 U.S. 895 (1976), the Court observed ". . . that an applicant should not be placed in the position of going forward with an application without knowledge of the [Commission's] requirements . . . elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected." See also, Salzer v. FCC, 778 F.2d 869, 875 (D.C. Cir. 9185); Maxell Telecom Plus Inc. v. FCC, 815 F.2d 1, 3 (D.C. Cir. 1987); Satellite Broadcasting Co. v. FCC, 824 F.2d 1, 3-4 (D.C. Cir. 1987)1.

In the case, Southwestern has been presented with conflicting notice of what the Commission expected of it since shortly after acquiring KZLK in July of 1990. Advice provided to it in staff correspondence conflicts with statements made in the HDO, the position taken by the Bureau at the first prehearing conference differs from its later decision refusing to process the KLZK Upgrade Application and the grounds for denying renewal in the S.D. differ from those stated in HDO for designating the application for hearing. To make matters worse, all of these conflicting policies were promulgated solely by the Bureau, which has no authority to either make new policy or change existing policy. See Horne Industries, Inc., 91 FCC 2d 1193, 1194 (Rev. Bd. 1982) (the Commission's delegations of authority to its staff do not include authorizations to make or change policy).

Thus, in this case, where the Commission itself has not adopted any policies concerning the primary issues, Southwestern will not know "what is expected [of it]"^{5/} until

^{5/} Banford v. FCC, supra, 535 F.2d at 82.

a decision is released on this appeal, long after the opportunity to present its case to the ALJ has expired.

The most egregious example of this unlawful process occurred when the Bureau reversed itself on the processing of the KLZK upgrade application in the three weeks between the June 6 and June 27, 1996 prehearing conferences. Before the first conference, counsel for Southwestern, after considering precedent established by the Bureau in similar cases^{6/} and never reversed or modified by the Commission, stated a desire to resolve the case without going through a hearing in his Notice of Appearance filed May 14, 1996. At the first prehearing conference the Bureau clearly stated its desire to cooperate with Southwestern in negotiating a mutually agreeable timetable for resumption of operations and to assist Southwestern in obtaining expedited processing of the already-filed KLZK Upgrade Application. Bureau counsel said these steps were being taken to assist licensees of silent stations to resume operations, "without regard to the reasons why" they had stopped operating. Tr. 19.

In other words, at the first conference the Bureau unequivocally stated its intention to follow previously established precedent, including the policies established in Expedited Processing, in assisting Southwestern to return KZLK to the air and obtain a favorable termination of this proceeding. After reversing itself at the second hearing conference, the Bureau was unable to cite any Commission-approved rationale for its actions. Instead, it merely provided its own interpretation of the Expedited Processing public notice, claiming

^{6/} See, Video Marketing Network Inc., 10 FCC Rcd 7611, 7613 (M.M.B. 1995); Keyboard Broadcasting Communications, 10 FCC Rcd 4489 (M.M.B. 1995); Cavan Communications Inc., 10 FCC Rcd 2873 (ALJ 1995).

that it was a "narrow exception" to the Bureau's own policy of refusing to process applications filed after release of a hearing designation order.^{7/} This lame explanation is in direct conflict with the Bureau's view of Expedited Processing expressed at the first hearing conference and by a fair reading of the document itself which clearly does not contain even a hint that it was a narrow exception to some unpublished Bureau policy.^{8/} As the Bureau readily conceded at the first conference, Southwestern was clearly in danger of having its license terminated under the new statute if it did not resume operation of KLZK by February 9, 1997. And, under the plain meaning of the first sentence of Expedited Processing, it was adopted to assist silent stations which needed "the Commission's grant of an application in order to resume operations" before the statutory deadline.

In short, the Bureau changed existing policy and adopted its own new policy, without approval by the Commission. The actions deprived Southwestern of the procedural rights enjoyed by similarly situated licenses to avoid protracted hearings by expeditiously returning their stations to the air. Since these actions were taken pursuant to policies established by the Bureau for the first time following designation of this case for hearing, long after Southwestern would have had a fair opportunity to comply with them, they must be reversed under the Greater Boston line of case cited above.

^{7/} Mass Media Bureau's Memorandum of Law and Policy, filed July 3, 1996, at page 2.

^{8/} The Bureau's explanation at page 3 of its Memorandum that it should not be "put to the expenditure of resources necessary to review and process the modification application" also rings hollow. By refusing to process the application it has converted an easily resolved hearing proceeding into a full blow litigation requiring the "expenditure" of substantial Commission resources by not only the Bureau, but by an ALJ, and the Commission itself.

Southwestern submits that under the unusual, if not unique, circumstances of this case, a Commission reversal of the Bureau's refusal to process the KLZK Upgrade Application could for all practical purposes, end this litigation. The Commission can merely issue an interlocutory order requiring the Bureau to process the KLZK Upgrade Application and holding further proceedings in abeyance until Southwestern either returns KLZK to the air with new facilities, or fails to do so by February 9, 1997, the statutory deadline for automatic termination of KLZK's license if it does not resume operations. Such action would conserve the resources of both Southwestern and the Commission, and return to Southwestern the rights provided to the licensees in Keyboard Broadcasting Communications and Cavan Communications Inc., supra. In those cases, applicants were allowed to demonstrate their "intent and ability to resume broadcast operations" after designation for hearing, and once they had done so, the hearings were terminated in their favor.^{2/} See Video Marketing Network, Inc., 10 FCC Rcd 7611, 7613 (MMB 1995). The Bureau has conceded that Southwestern possesses the basic qualifications to be a licensee, and violations of Section 73.1740 and 73.1750 of the Commission's Rules do not, standing alone, raise material questions concerning a Licensee's basic qualifications. See Tr. 3 and Video Marketing Network Inc., supra, 10 FCC Rcd at 7613.

The interlocutory order requested by Southwestern would, in effect, settle this litigation and provide Southwestern with the means to return KLZK to the air immediately.

^{2/} In Cavan Communications, the Bureau's processing staff granted a request for an STA and accepted a license application both of which were filed after designation for hearing in order to assist the licensee in returning to the air. See 10 FCC Rcd. at 2874, ¶15 and n. 2. In contrast, in this case the Bureau refused to process the KLZK Upgrade Application filed only 10 days after hearing designation.

Settlements reached for the purpose of ending litigation and inaugurating service to the public are greatly favored under Commission policy. The Commission routinely accepts, without requiring a "good cause" showing, amendments to applications requiring staff processing in order to facilitate settlements in hearing cases. Las Americas Communications Inc., 5 FCC Rcd 1634, 1637 ¶25 (1990); Frank Digesu, Sr., 9 FCC Rcd 7866, ¶5 (Rev. Bd. 1995); Tracy A. Moore d/b/a Gifford Orion Broadcasting Ltd., FCC 93I-074, released December 21, 1993 (OGC), Slip Opinion at ¶¶ 1 and 12. See also, Rem Malloy Broadcasting, 11 FCC Rcd 4064, 4065-66 (Rev. Bd. 1996), recon. denied, FCC 96-348, released August 22, 1996. An order requiring the Bureau to process and grant the KLZK Upgrade Application would not be any more onerous than the processing of the amendments accepted in the cited cases.

Accordingly, Southwestern respectfully requests the Commission to order the Bureau to process the KLZK Upgrade Application under Expedited Procedures, and order that this proceeding be held in abeyance until February 7, 1997, or the earlier filing by Southwestern of notice that it has resume operation of KLZK.

B. The Commission Never Provided Southwestern with Adequate Notice that KLZK Could Resume Operating on Any Channel During the Years the Station was Silent

In paragraphs 16 and 17 of the S.D., the ALJ repeatedly faults Southwestern for failing to return KLZK to the air as a Class A station on Channel 280 or 282 and for failing to file an application for authority to operate on Channel 282C2. The record demonstrates that the Commission never informed Southwestern of these "options". In fact, while Southwestern 's president was in regular contact with the Commission's staff for almost six

years, the evidence reveals that the advice he received was in direct conflict with this underlying premise of the S.D.

When Southwestern acquired KLZK on July 1, 1990, it had been silent for almost two years, and its authority to remain silent had expired 18 months earlier.^{10/} The former owner had informed the Commission in 1988 that KLZK had ceased operations pending action on a request to upgrade the station from Channel 280A to Channel 282C2 contained in a Notice of Proposed Rulemaking released December 17, 1987. (3 FCC Rcd 231). HDO ¶2. The requested upgrade was authorized in a Report and Order, 3 FCC Rcd 6158, adopted September 28, 1988. The former licensee filed an application for a permit to implement the upgrade on October 27, 1988, and it was in pending status when Southwestern acquired KLZK on July 1, 1990. Ex. A, p. 2.

However, before Southwestern acquired KLZK the Commission had taken other actions which effectively prevented resumption of operation as a Class A station as either a Class A or C2 station on Channel 282. On March 25, 1988, the Bureau authorized KMMX(FM) (then KLSC), Lamesa, Texas, to begin operating with new facilities on Channel 284C1, at a site north of Lamesa. Exs. A, p. 2 and B.^{11/} The KMMX STA

^{10/} See page 3, n. 4 of the letter from the Chief of Bureau's Audio Services Division to James P. Riley et al., attached to Southwestern's Motion for Summary Decision as Exhibit A. Said letter is hereinafter referred to as "Ex. A". The other exhibits attached to the motion are similarly referenced.

^{11/} In Ex. B, the Bureau granted assignment applications authorizing the licensees of two Lamesa, Texas, FM stations, KIOL (then KUFO) and KMMX (then KLSC) to exchange their licenses and frequencies so that KIOL acquired the right to broadcast on KMMX's former Channel, 262C1, and KMMX acquired the right to broadcast on KIOL's former Channel 284C1. The two licensees had also filed applications requesting permission to relocate their transmitter sites so that KIOL could operate on Channel 262C1 at its existing

authorized construction of facilities on Channel 284C1 at a site which was so close to Brownfield that KLZK was foreclosed from operating any class of station on Channel 282 in that community under the mileage separation requirements of the Commission's Rules, 47 C.F.R. § 73.207, i.e. the KMMX STA site was 45.4 kilometers "short-spaced" to a hypothetical operation of KLZK on Channel 282A and 49.4 kilometers short-spaced for operations on Channel 282C2. Ex. A, p. 3 and n. 5.

Another action by the Bureau prevented Southwestern from resuming operation of KLZK as a Class A station on Channel 280A. In what the Bureau later referred to as "yet another complication,"^{12/} the Bureau authorized KKYN-FM, Plainview, Texas, to upgrade its facilities from Channel 280A to Channel 281C1 in Report and Order, 4 FCC Rcd 8788, released on December 27, 1989 some 6 months before Southwestern acquired KLZK. In ordering the KKYN upgrade, the Allocations Branch recognized that it was short-spaced to KLZK's licensed site for operation on Channel 280A, but noted that KLZK had been authorized to upgrade to Channel 282C2 and had recently filed an application to effectuate the upgrade. Id. at ¶1. The Allocations Branch also noted KLZK's silent status but refused a request by KKYN for issuance of a show cause order requiring the former licensee to resume operation on a channel other than Channel 280. Id. ¶2. Finally, the Allocation

site south of Lamesa and KMMX could operate on Channel 284C1 at a new site north of Lamesa. The Bureau did not grant the site change applications, stating that they would be processed in due course. Ex. B. However, the Bureau did issue STA's to both KIOL and KMMX to operate with the facilities requested in those applications. Ex. B, p. 3. The new facilities for KMMX on Channel 284C1 were constructed and the station began operating pursuant to the STA in 1988. Official notice required.

^{12/} Ex. A, p. 5, n. 9.

Branch stated that KLZK could return to operations on Channel 280A for an indeterminate period of time until a construction permit to effectuate the KKYN upgrade was issued, at which time Southwestern could either begin operations on Channel 282C2 as proposed in its then recently filed application or file an application to downgrade to 282A. Id., ¶4.

A copy of the Plainview decision was sent to the former licensee of KKTZ. Id. at ¶8. However, there is no evidence that any Southwestern principal ever became aware of its contents prior to 1996. The KKYN application for a permit to implement its upgrade, File No. BPH-901131IA, was filed on December 11, 1990, soon after Southwestern acquired KLZK, and a permit was issued on April 28, 1992. Official notice requested.

Shortly after acquiring KLZK in July of 1990, Thomas Crane, Southwestern's president, learned of the KMMX STA/KLZK Channel 282C2 conflict in conversations with the staff of the Bureau's Audio Services Division. Ex. F, ¶ 2. The staff told him that the private parties should attempt to work out a solution and make a proposal to the Commission for its approval. Id. Mr. Crane then discussed the matter with an engineering consultant, and, in October of 1990, made a detailed proposal for resolving the problem to the president of 100.3 Radio, Inc., the licensee of KIOL. Id. When his proposal to 100.3 Radio went unanswered, Mr. Crane wrote the Bureau on January 10, 1991, proposing a similar solution to the problem. Id. The Chief of the Bureau's FM Branch responded to Crane's letter by letter of January 30, 1991, Ex. G. The second paragraph of said letter acknowledged the conflict between the KMMX STA and KLZK's ability to operate on Channel 282C2. Id., p. 1. However, the Chief of the FM Branch merely noted that Mr. Crane's proposed solution would require the filing of a petition for rulemaking and encouraged such a filing because

that "would provide each party a forum to express its views as well as afford the Commission an opportunity to achieve a comprehensive solution in the matter." Id., p. 2. Copies of the letter were sent to the licensees of KIOI and KMMX. Id.

Mr. Crane participated in additional negotiations with the licensees of KMMX and KIOI in the Spring of 1992, and agreed to a proposed solution advanced by KMMX on June 17, 1992. Ex. G, ¶4. (The KMMX proposal is described in n. 6 on p. 4, Ex. 4.) However, the private parties could not come to an agreement. Ex. G, ¶ 4.

On December 3, 1992, the Chief of the Bureau's Audio Services Division sent Southwestern another letter, which noted that the authority to remain silent issued KLZK's former licensee, had expired in January 1989 and that the KLZK Upgrade Application had been dismissed. Ex. I, p. 1. Then, without any reference whatsoever to the KMMX STA conflict or the KKYN, Plainview, Texas, upgrade to Channel 280C1, the letter asked for clarification of KZLK's operational status and suggested that Southwestern could take one of three actions to achieve compliance with Commission Policies:

- (1) Notification to this office that KLCU(FM) resumed broadcast operations as a Class A facility prior to the date of this letter;
- (2) Notification to this office that KLCU will immediately resume Class A broadcast operations;
- (3) Request special temporary authority, pursuant to Section 73.1635 of the Commission's Rules, to remain silent. Such request should include a justification for the continued silence of the station and a description of the steps you are taking to return it to the air.

The first two "options" were meaningless when the December 3, 1992 letter was written. As described above, the KMMX STA prohibited operation on Channel 282A and

the KKYN upgrade construction permit granted seven months earlier prevented a return to operation on Channel 280.

Mr. Crane responded to the Bureau's letter by letter dated January 6, 1993. Ex. 5. He noted the KMMX STA operation and the KKYN upgrade, and described at some length his attempts to work out a solution to the problem with the licensees of KMMX and KIOL. Ex. J, pp. 2-3. Mr. Crane then requested an STA "to remain silent for six months or until such time as a construction permit for 282C2 is issued with 90 days to construct." Id. p. 3.d.

Mr. Crane's response was the catalyst for a meeting at the Commission in April 1993 between counsel for KMMX, counsel for KIOL, the then Chief of the Audio Services Division, the Chief of the FM Branch and other Bureau personnel. Ex. F, ¶ 5. Various methods of solving the conflict were discussed at the meeting and counsel for KMMX and KIOL agreed to consult with their clients concerning additional negotiations. Id. By Fall of 1993, KIOL and KMMX reached an agreement in principle looking toward a solution to the problem and Mr. Crane agreed to pay \$5,000 towards the expenses to be incurred by KIOL in completing the solution. Id.

However, before the agreed upon solution could be finalized, the Commission sent a letter to the parties on December 1, 1993. Ex. A. The Bureau concluded that the "primary problem" facing the Commission, Southwestern and the licensees of KMMX and KIOL was that the KMMX STA was "short-spaced by 49.4 kilometers to the higher-priority reserved upgrade and frequency change allotment for KLZK in Brownfield" Ex. A, p. 3 (footnote omitted). The Bureau then noted that while several parties had proposed solutions to "this

unfortunate circumstance" no joint proposal had been submitted to the Commission. Id. Accordingly, the Bureau proposed to cancel the STA's granted to KMMX and KIOL and dismiss their pending applications for permanent authority on the facilities described in the STA's, stating, inter alia, "KMMX's . . . application cannot be granted, nor can it be used further to delay the implementation of upgraded service to Brownfield [by KZLK]" Id., p. 4 (emphasis added).

The Bureau concluded its Letter by ordering KMMX and KIOL to cease operating under their STA's and return to operation with previously licensed facilities. Id., p. 4. However, in order to allow time for the required changes to be made, the STA's were continued for 90 days, with the advisory that "requests for further extension will not be granted." Id., p. 5. With the ordered changes in the KMMX operation in mind, the Bureau then ruled that Southwestern had not made a showing sufficient to warrant favorable action on the STA request contained in its January 7, 1993 letter (Ex. J) and stated that said request and further action on the KLZK renewal application would be held in abeyance pending receipt of additional information to be supplied within 30 days. Id., p. 5. The additional information requested included a description of the steps Southwestern would take to return KLZK to the air "once KMMX has returned to its former [non-STA] facilities."

While the above-described action terminating the KMMX STA would have created an opportunity for Southwestern to request Commission permission to begin operations on either Channel 282A or Channel 282C2, the Bureau quickly reversed itself. Less than a month later Southwestern and the licensees of KIOL and KMMX entered into an agreement which provided a solution to the problem. Ex. K. Immediately thereafter, the parties began